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In The

**United States Court Of Appeals  
For The Fourth Circuit**

**MAXWELL KADEL; JASON FLECK;  
CONNOR THONEN-FLECK, by his next friends and parents;  
JULIA MCKEOWN; MICHAEL D. BUNTING, JR.;  
C.B., by his next friends and parents; SAM SILVAINE**

*Plaintiffs - Appellees,*

v.

**NORTH CAROLINA STATE HEALTH PLAN  
FOR TEACHERS AND STATE EMPLOYEES,**

*Defendant - Appellant,*

and

**DALE FOLWELL, in his official capacity as State Treasurer of North Carolina;  
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL;  
NORTH CAROLINA STATE UNIVERSITY; DEE JONES, in her official capacity as  
Executive Administrator of the North Carolina State Health Plan for Teachers and State  
Employees; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO**

*Defendants.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO**

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**BRIEF OF NONPROFIT CIVIL RIGHTS, ADVOCACY  
and PUBLIC INTEREST ORGANIZATIONS AS *AMICUS*  
*CURIAE* URGING AFFIRMANCE IN SUPPORT OF  
PLAINTIFFS-APPELLEES**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, 29, and Local Rule 26.1, the undersigned counsel of record certifies that none of the *Amici Curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10 percent or more of its stock. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated: October 7, 2020

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## I. INTRODUCTION

Section 1557 of the Affordable Care Act (ACA) offers a simple promise. Americans have a basic right to be free of discrimination when seeking access to federally-supported health care. Across our health care system, that right is all the more important in the context of government programs and activities. When engaged with their own government, consumers ought to be especially secure in their expectation of equal treatment. Conversely, where governmental actors engage in discrimination, it is particularly repugnant. Such a breach calls out for redress.<sup>1</sup> “How ‘uniquely amiss’ it would be [] if the government itself - ‘the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct’ - were permitted to disavow liability for the injury it has begotten.”<sup>2</sup> Where state entities maintain a course of discrimination against discrete communities, who have long, iniquitous histories of purposefully unequal treatment in the public

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<sup>1</sup> In the parallel context of constitutional violations, the Supreme Court has specifically identified the importance of redress. “The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by *the unlawful exercise of governmental power*. . . . Thus, when the rights of persons are violated, ‘the Constitution requires redress by the courts. . . .’” *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) (emphasis added) (quoting *Schuette v. BAMN*, 572 U.S. 291, 311 (2014)).

<sup>2</sup> *Owen v City of Independence*, 445 U.S. 622, 651 (1980) (quoting *Adickes v. Kress & Co.*, 398 U.S. 144, 190 (1970)).

sphere, the prerogative for judicial enforcement of Section 1557 is at its high-water mark. This amicus brief shines a light on the importance of preserving robust avenues of legal enforcement of Section 1557—especially private damages actions—against state governments, with a focus on sex discrimination against transgender people and those seeking reproductive care.<sup>3</sup>

## II. STATEMENT OF INTEREST

*Amici Curiae* are a group of nonprofit civil rights, advocacy and public interest organizations: Clearinghouse on Women's Issues, Feminist Majority Foundation, Gender Equality Law Center, Harvard Law School LGBTQ+ Advocacy Clinic, Legal Voice, NARAL Pro-Choice America, National Center for Lesbian Rights, National Health Law Program, National Women's Law Center, North Carolina AIDS Action Network, Planned Parenthood South Atlantic, Women's Bar Association of the District of Columbia, Women's Bar Association of the State of New York.

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<sup>3</sup> Although this brief focuses on sex discrimination by the state, *Amici* note that prohibiting private damages actions against states under Section 1557 would have additional negative impacts, limiting avenues of recovery for those who experience discrimination based on race/national origin, disability, age, or the intersection of more than one of these characteristics. See, e.g., *Enforcement Success Stories Involving Persons With Limited English Proficiency*, U.S. Dep't Health & Human Servs., <https://bit.ly/2O5LJ4a>; National Health Law Program, *Comment Letter on 2019 Proposed Rule* at 19, 27-37, 46-49, 75 (Aug. 13, 2019), <https://bit.ly/3ix8Lh9>.

*Amici Curiae* respectfully submit this brief in support of Plaintiffs Maxwell Kadel, Jason Fleck, Connor Thonen-Fleck, Julia McKeown, Michael D. Bunting, Jr., C.B., and Sam Silvaine.<sup>4</sup> Through a variety of different missions, each *Amicus Curiae* organization supports broad access to health care, especially on behalf of members of historically marginalized communities, such as transgender and gender non-conforming people. Each of the *Amici Curiae* is also dedicated to robust enforcement of federal civil rights protections in a manner that constrains government actors from promoting or engaging in sex discrimination. Individualized statements of interest from the *Amici Curiae* appear in a separately filed Addendum.

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<sup>4</sup> No party or its counsel authored this brief in whole or in part, and no person or entity other than *Amici Curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

### III. ARGUMENT

#### A. Section 1557 Broadly Prohibits Discrimination in Health Programs and Activities.

The ACA was signed into law in 2010.<sup>5</sup> As articulated by the Supreme Court, the law’s purpose is broad: “to increase the number of Americans covered by health insurance and decrease the cost of health care.”<sup>6</sup> Consistent with this broad mandate, Section 1557 of the ACA expands insurance coverage and access to health care by eliminating discriminatory barriers.<sup>7</sup>

Section 1557, “unmatched in its reach,” is a key tool to combat discrimination across the health insurance and health care landscape.<sup>8</sup> The statute

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<sup>5</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>6</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538–39 (2012).

<sup>7</sup> 42 U.S.C. § 18116(a); *see also* Health Care and Education Reconciliation Act of 2010, 156 Cong. Rec. S. 1821, 1842 (daily ed. Mar. 23, 2010) (stating that the ACA’s “explicit[] prohibit[ion]” of “discrimination on the basis of race, color, national origin, sex, disability or age in any health program or activity receiving Federal funds” was “necessary to remedy the shameful history of invidious discrimination and the stark disparities in outcomes in our health care system” and “ensure that all Americans are able to reap the benefits of health insurance reform equally without discrimination”) (statement of Sen. Patrick Leahy). *See generally* Valarie K. Blake, *Civil Rights As Treatment for Health Insurance Discrimination*, 2016 Wis. L. Rev. Forward 37, 42 (2016) (“Section 1557 is driven by the Civil Rights Act of 1964, the mission of which was that ‘[s]imple justice requires that public funds, to which all taxpayers . . . contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in . . . [protected class] discrimination.’”) (quoting *Overview of Title VI of the Civil Rights Act of 1964*, U.S. DEP’T JUST. (last updated Jan. 22, 2016)).

<sup>8</sup> *Griffin v. General Electric Company*, 2017 WL 3449607, at \*5 (N.D. Ga. 2017).

prohibits discrimination based on certain characteristics, namely, sex (including, *inter alia*, transgender status, sexual orientation, sex stereotypes, pregnancy, and childbirth)<sup>9</sup>, race, color, national origin, age, disability, or a combination of one or more of these characteristics.<sup>10</sup> The statute applies to a broad array of entities, namely, “any health program or activity, any part of which is receiving Federal financial assistance.”<sup>11</sup> Lastly, and of particular importance to the issue on appeal

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<sup>9</sup> See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1747 (2020) (holding that Title VII’s prohibition on discrimination on the basis of sex also bars discrimination on the basis of gender identity or sexual orientation); see also 34 C.F.R. § 106.40(b)(1) (“A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, *on the basis of such student’s pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom . . .*”) (emphasis added).

<sup>10</sup> 42 U.S.C. § 18116(a) (prohibiting discrimination based “on the ground prohibited under” four cross-referenced statutes: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act).

<sup>11</sup> 42 U.S.C. § 18116(a) (prohibiting discrimination by “*any* health program or activity, *any part of which* is receiving Federal financial assistance”) (emphasis added). As the District Court noted, the parties to this case “do not appear to dispute that the [State Health] Plan is a ‘health program or activity . . . receiving Federal financial assistance’ within the meaning of Section 1557.” *Kadel v. Folwell*, 446 F. Supp. 3d 1, 15 (M.D.N.C. 2020); see also Pl.’s Response Br. at 26-28. Innumerable other federally-funded state health-related entities are likewise subject to Section 1557. See, e.g., Virginia Department of Human Resources Management, Ombudsman Annual Report Fiscal Year 2017, <https://bit.ly/33C00yf> (“The Department of Human Resource Management’s Office of Health Benefits reviewed the provisions of ACA Section 1557 and implemented the [following] processes to ensure compliance.”); North Carolina, Uniform Application: FY 2020/2021, *Substance Abuse Prevention and Treatment Block Grant Plan*, <https://bit.ly/3jdzEI6> (agreeing to comply with “Section 1557 . . . and all

in this case, Section 1557 contains a private right of action and permits plaintiffs to recover compensatory damages.<sup>12</sup>

Because the underlying statutes that make up Section 1557 allow for administrative enforcement via civil monetary penalty, the U.S. Department of Health and Human Services Office of Civil Rights (OCR) has the ability to pursue this relief against those who engage in discrimination.<sup>13</sup> Despite the breadth of the remedial action available to it, however, OCR only rarely seeks monetary penalties in civil rights actions.<sup>14</sup> That OCR does not typically harness the well-established capacity of financial redress as a means of enforcing Section 1557 underscores the critical importance of private lawsuits. *See infra*, Section III(D). Likewise, Section 1557's incorporation of the enforcement mechanisms of the four preexisting civil

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requirements imposed by or pursuant to the Regulation of the Department of Health and Human Services (45 CFR Part 92).”).

<sup>12</sup> Section 1557 incorporates the “enforcement mechanisms” of four anti-discrimination statutes, all of which contain a private right of action. *See* 42 U.S.C. § 18116(a); *see, e.g., Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 845 (D.S.C. 2015).

<sup>13</sup> *See, e.g.,* Settlement Agreement between U.S. Department of Health & Humans Services Office of Civil Rights and Genesis Healthcare, LLC, at 8 (March 1, 2013), <https://bit.ly/30ojdBD> (reflecting a civil settlement in which OCR reserved its right to seek civil monetary penalties in a case based, *inter alia*, on Section 504 of the Rehabilitation Act).

<sup>14</sup> *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 84 Fed. Reg. 23170-01 (May 21, 2019) (“In civil rights cases, complaint investigations in which [OCR] finds a violation are usually resolved by corrective action.”).

rights statutes reflects a broad remedial purpose necessary to ensure nondiscrimination in health care.

**B. States are Responsible for a Significant Portion of the Discrimination in Health Programs and Activities.**

State governments play a critical role in the delivery of health care and health insurance services. For example, in North Carolina, state government administers or operates an extensive array of health care and health insurance programs or activities, including: hospitals and outpatient facilities<sup>15</sup>; mental health facilities<sup>16</sup>; university health care providers<sup>17</sup>; nursing homes<sup>18</sup>; skilled nursing

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<sup>15</sup> See North Carolina Dep't of Health and Human Servs. (NCDHHS), *Facility Data Reports*, <https://bit.ly/3mWMehk> (listing three state hospitals, not counting state university-run or affiliated hospitals).

<sup>16</sup> See NCDHHS, *Facilities*, <https://bit.ly/33aB8xb> (discussing three psychiatric hospitals); see also NCDHHS, *State Operated Healthcare Facilities*, <https://bit.ly/33dKb0u> (noting that a state agency “oversees and manages 14 state operated healthcare facilities that treat adults and children with mental illness . . .”).

<sup>17</sup> See UNC Health, *About Us*, <https://bit.ly/36iaViu> (“UNC Health Care is a not-for-profit integrated health care system owned by the state . . . [that] comprises UNC Hospitals and its provider network, the clinical programs of the UNC School of Medicine, and eleven affiliate hospitals and hospital systems.”).

<sup>18</sup> See NCDHHS, Nursing Home Licensure and Certification Section, *Regulated Facilities State Operated Nursing Homes*, <https://bit.ly/30cJPFu> (listing three state-operated nursing homes with a total of 509 beds); Dep't of Military and Veterans Affairs, *NC State Veterans Homes*, <https://bit.ly/2Gg1jtt> (discussing “4 full-service state veterans homes with 449 skilled care beds”).

facilities<sup>19</sup>; rehabilitation centers<sup>20</sup>; prisons and juvenile detention facilities<sup>21</sup>; emergency medical services and medical transportation<sup>22</sup>; pharmacies<sup>23</sup>; laboratory services (e.g., HIV testing, newborn screenings)<sup>24</sup>; developmental and residential centers for individuals with disabilities<sup>25</sup>; alcohol and drug abuse treatment centers<sup>26</sup>; home health care services<sup>27</sup>; and hospice care.<sup>28</sup> In every state, these services also include the provision of state-sponsored employee and retiree health

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<sup>19</sup> See NCDHHS, *Facilities*, <https://bit.ly/33aB8xb> (discussing three state specialized skilled nursing facilities serving adults with disabilities).

<sup>20</sup> See UNC Medical Ctr., UNC Health Care, *UNC Rehabilitation Ctr.*, <https://bit.ly/3cFG7cm>.

<sup>21</sup> See NC Department of Public Safety, *Prison Facilities*, <https://bit.ly/339GQ2s> (listing fifty-five prison facilities).

<sup>22</sup> See NC Division of Health Service Regulation, *Office of Emergency Medical Services*, <https://bit.ly/2S5FKOP>; NCDHHS, NC Medicaid Division of Health Benefits, *Ambulance Services*, <https://bit.ly/2S5FKOP>.

<sup>23</sup> See UNC Medical Ctr., UNC Health Care, *Carolina Care Pharmacy Network*, <https://bit.ly/3i5XMeA> (listing five state-affiliated pharmacies).

<sup>24</sup> See NCDHHS, *State Laboratory of Public Health*, <https://bit.ly/339svTC>.

<sup>25</sup> See NCDHHS, *Facilities*, <https://bit.ly/33aB8xb> (listing three state developmental centers for adults with disabilities and two residential programs for children with disabilities).

<sup>26</sup> See *id.* (listing three state alcohol and drug abuse treatment centers).

<sup>27</sup> See Rex Health, *Home Care Services*, <https://bit.ly/3mXfdBz> (discussing two UNC home health care providers serving thirty counties).

<sup>28</sup> See UNC Health, *SECU Jim & Betsy Bryan Hospice Home*, <https://bit.ly/3jdUqay>.

insurance,<sup>29</sup> health insurance for students enrolled in state universities,<sup>30</sup> and Medicaid and the Children’s Health Insurance Program.<sup>31</sup>

Given their central role in the health care and health insurance landscape, state governments are responsible for a substantial volume of health care and insurance practices that lead to conduct prohibited by Section 1557. This includes not only state health plans that exclude coverage for transition-related care,<sup>32</sup> but also the following:

- State departments of corrections that deny appropriate transition-related care to people who are incarcerated;<sup>33</sup>

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<sup>29</sup> State governments are often a state’s largest employer. *See* North Carolina State Government Employee Statistics, <https://bit.ly/36053u0> (employing over 81,000 people). In addition to providing health insurance to employees, states sometimes extend this option to non-state employees. *See* North Carolina State Health Plan, *New Groups Interested in Joining the Plan*, <https://bit.ly/2Gc53fz> (allowing charter schools and local governments to offer state-sponsored health insurance).

<sup>30</sup> Public universities enroll more than 13 million students in the United States. National Center for Education Statistics, *Digest of Education Statistics: Table 303.70 (2019)*, <https://bit.ly/2RTdaAj>.

<sup>31</sup> Medicaid and CHIP, both jointly funded with federal and state funding, enroll over 73 million people across the country. *See* May 2020 Medicaid & CHIP Enrollment Data Highlights, <https://bit.ly/33XI3Jx>.

<sup>32</sup> *See, e.g., Kadel v. Folwell*, 446 F. Supp. 3d 1, 7 (M.D.N.C. 2020); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 581 (S.D.N.Y. 2016), *on reconsideration*, 218 F. Supp. 3d 246 (S.D.N.Y. 2016); *see also* Movement Advancement Project, *Healthcare Laws and Policies, State Employee Benefits*, <https://bit.ly/3kWSSIM> (documenting 21 states that “do[] not include transgender and transition-related healthcare in their state employee health benefits,” and 12 states that “explicitly exclude[] transition-related healthcare in their state employee health benefits”).

<sup>33</sup> *See, e.g., Edmo v. Idaho Dept. of Correction*, 1:17-CV-00151-BLW, 2018 WL 2745898, at \*9 (D. Idaho June 7, 2018).

- State Medicaid plans that exclude coverage for transition-related care;<sup>34</sup>
- State university medical facilities that fail to provide interpreters to people with hearing impairments;<sup>35</sup>
- State health care services that harass, misgender, or otherwise deny appropriate care to transgender patients, including refusing to provide mammograms to transgender women who have undergone or are undergoing hormone therapy;<sup>36</sup>
- State hospital policies that bill married individuals differently on the basis of sex, and that deny appropriate care and treatment to male survivors of domestic violence;<sup>37</sup> and
- State health plans that exclude breastfeeding and lactation support services.<sup>38</sup>

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<sup>34</sup> See, e.g., *Cruz v. Zucker*, 195 F. Supp. 3d 554, 581 (S.D.N.Y. 2016), *on reconsideration*, 218 F. Supp. 3d 246 (S.D.N.Y. 2016).

<sup>35</sup> See, e.g., *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. 2:17-cv-4803, 2017 WL 4791185 (E.D. La. Oct. 24, 2017).

<sup>36</sup> See, e.g., *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099-1100 (S.D. Cal. 2017) (holding that hospital affiliated with state university violated Section 1557). Cf. *OCR Section 1557 Enforcement*, <https://bit.ly/2NVdmgj> (discussing resolution of OCR complaint against private hospital that housed transgender people in double-occupancy patient rooms with members of a different sex and another complaint against a federally-funded state wellness program that denied mammogram coverage to a transgender person).

<sup>37</sup> Cf. *id.* (discussing resolution of OCR complaints against private hospitals that treated male spouses, but not female spouses, as the sole financially responsible party when their spouse received medical services and another complaint about a provider subjecting a patient to rude comments because he was a male survivor of domestic violence).

<sup>38</sup> Cf. *Connery v. UnitedHealth Grp., Inc.*, No. 17-cv-00183-VC, 2018 WL 3203046, at \*2 (N.D. Cal. June 27, 2018) (granting summary judgment to two plaintiffs for private health insurer's failure to provide meaningful coverage for preventive breastfeeding services); *Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725, 734 (N.D. Ill. 2017) (holding that plaintiffs adequately alleged that

## C. State-Sponsored Discrimination in Health Programs and Activities has Severe Consequences.

### 1. *Marginalized Communities Experience Widespread Discrimination in Health Care Settings.*

This discrimination comes at great cost to marginalized communities.

Transgender and gender non-conforming people, as well as people seeking reproductive health care, continue to face widespread discrimination in health care settings.<sup>39</sup>

These wrongs are well-documented. The United States Transgender Survey reported that one in three respondents who saw a provider in the past year had at least one negative experience, such as being refused care, harassed, or physically or sexually assaulted, or having to teach the provider about transgender people in order to receive appropriate care.<sup>40</sup> The rate of discrimination was higher for most

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private health insurer failed to provide meaningful coverage for preventive breastfeeding services); *see also* National Women's Law Center, *State of Women's Coverage: Health Plan Violations of the Affordable Care Act*, (2015) <https://bit.ly/2G34Xay> (documenting private health plan violations of ACA requirements related to women's health coverage).

<sup>39</sup> *See, e.g.*, Planned Parenthood Fed'n of Am., *Comment Letter on 2019 Proposed Rule*, at 7 (Aug. 13, 2019) <https://bit.ly/2F3Js8S>; *see also* Equality North Carolina, *Comment Letter on 2019 Proposed Rule*, at 3 (Aug. 13, 2019), <https://bit.ly/33bDHPW> (discussing a 65-year-old transgender woman who was refused care at the only hospital in her area of western North Carolina and told that she would be arrested if she returned).

<sup>40</sup> Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality 10, 95-96 (Dec. 2016), <https://bit.ly/30aogFp> [hereinafter U.S. Transgender Survey] (surveying nearly 28,000 respondents).

respondents of color, with 50% of American Indian and 40% of Middle Eastern respondents reporting negative experiences with providers.<sup>41</sup> Other surveys have documented higher rates; for example, a needs assessment of transgender and gender non-conforming people living with HIV found that more than half of respondents (57%) were denied care by a provider because of gender identity.<sup>42</sup> In addition to facing discrimination in provider settings, transgender and gender non-conforming people have experienced discrimination in insurance. Specifically, insurers have excluded coverage of care related to gender dysphoria and, by coding certain services to correspond with a particular gender marker, have required transgender and gender non-conforming people to appeal coverage denials for medically necessary care.<sup>43</sup>

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Similar patterns have been found in other surveys. *See, e.g.,* Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV* 5-6 (2010), <https://bit.ly/34609Jq> (noting that 70% of transgender and gender non-conforming respondents reported having a provider who refused needed care, refused to touch the respondent or used excessive precautions, used harsh or abusive language, blamed the respondent for their health status, or was physically rough or abusive).

<sup>41</sup> U.S. Transgender Survey, *supra*, at 97.

<sup>42</sup> Cecilia Chung, et al., *Positively Trans: Initial report of a national needs assessment of transgender and gender non-conforming people living with HIV* 9 (2016), <https://bit.ly/3nl8nWR>.

<sup>43</sup> *See, e.g., Lange v. Houston Cnty., Georgia*, No. 5:19-CV-00392 (M.D. Ga.) (complaint filed Oct. 2, 2019), <https://bit.ly/3lhZviK> (challenging categorical exclusions of gender affirming care from a public employee health insurance plan).

People seeking reproductive health care have also faced discrimination, including refusals to provide or cover certain medical services.<sup>44</sup> For example, people have been denied emergency services (related to miscarriages and ectopic pregnancies) and other reproductive health services (such as tubal ligations) due to institutional religious affiliations.<sup>45</sup> Others have been denied access to care because of an individual provider's religious beliefs.<sup>46</sup> Additionally, people seeking reproductive health services have faced discrimination in health care plans; for example, some health insurance plans specifically exclude coverage of maternity

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<sup>44</sup> See NPR, Robert Wood Johnson Found., & Harv. T.H. Chan. Sch. Pub. Health, *Discrimination in America: Experiences and Views of American Women* 7 (Dec. 2017), <https://bit.ly/3ivlFxm>; National Alliance to End Sexual Violence, *Comments on 2019 Proposed Rule* 9-10 (August 9, 2019), <https://bit.ly/3ednU53>.

<sup>45</sup> See National Women's Law Center, *Health Care Refusals Harm Patients: The Threat to Reproductive Health Care* 3-4 (May 2014), <https://bit.ly/342MmDn>; see generally National Women's Law Center, *Below the Radar: Health Care Providers' Religious Refusals Can Endanger Pregnant Women's Lives and Health* (Jan. 2011), <https://bit.ly/2ZaP6gI>.

<sup>46</sup> See *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 223 (3d Cir. 2000) (ruling against labor and delivery nurse who invoked religious beliefs to deny vital emergency care for pregnancy complications, including leaving a patient "standing in a pool of blood"); Micah McCoy, ACLU-NM, "*I won't fill your birth control prescription*" (June 27, 2012), <https://bit.ly/3cFIE6G> (describing a pharmacist who refused to refill birth control); Letter from Michael J. Steinberg, ACLU-Michigan, et al., to Rick Keys, Meijer Pharmacy, et al., at 2 (October 16, 2018), <https://bit.ly/337xgNr> (describing a pharmacist who refused to dispense medication to a patient with early pregnancy loss because he did not believe her fetus was no longer viable).

services for dependents, subjecting plan beneficiaries to sex-based discrimination.<sup>47</sup>

2. *Marginalized Communities Experience Negative Health Outcomes as a Result of Health Care Discrimination.*

This catalog of discrimination is the root cause of immeasurable harm.

“There is a well-documented link between experiences of discrimination and marginalization and poor physical and mental health outcomes.”<sup>48</sup> For example, among respondents to the U.S. Transgender Survey, those who experienced discrimination due to their gender identity in the prior year were more likely to have attempted suicide during that period (13.4%) than participants who had not experienced such discrimination (6.3%).<sup>49</sup> These negative health effects are especially profound in the context of health care discrimination. Simply put,

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<sup>47</sup> See National Women’s Law Center, Press Release, *Victory in Sex Discrimination Complaints Brought by NWLC: After Investigation by HHS, Employers Change Policies* (Jan. 26, 2017), <https://bit.ly/36edUIC> (discussing resolution of complaints filed with OCR against two state university entities); see also Megan Leonhardt, *This 24-year-old Mistakenly Thought Her Health Insurance Covered Her Pregnancy—and 4.2 million Others Like Her May be at Risk* (Nov. 26, 2019), <https://cnb.cx/3i8QS8u> (discussing exclusion of coverage of maternity services); Michelle Andrews, *Parents’ Insurance Covers children up to Age 26 — but not for Pregnancy*, *Washington Post* (Aug. 6, 2012), <https://wapo.st/3i31kOI>.

<sup>48</sup> U.S. Transgender Survey, *supra*, at 103.

<sup>49</sup> Jody L. Herman et al., *Suicide Thoughts and Attempts among Transgender Adults: Findings from the 2015 U.S. Transgender Survey* 21 (2019), <https://bit.ly/2HZPp82>.

“insufficient access to quality care and coverage contribute[s] to poor health outcomes.”<sup>50</sup> As a result of barriers to receiving appropriate medical care, “[r]espondents were substantially more likely to be living with HIV than the general population, with much higher rates among transgender women of color.”<sup>51</sup> Respondents who directly experienced discriminatory obstacles to health were also more likely to report “poor mental health outcomes, including higher rates of substance use, serious psychological distress, and suicide attempts.”<sup>52</sup> People who receive inadequate reproductive care likewise experience an array of poor health outcomes, including pregnancy-related mental illness and death.<sup>53</sup>

When discrimination against marginalized communities is state-sanctioned, the harm is particularly acute. Studies have shown that state same-sex marriage bans and the absence of sexual orientation hate crime or employment

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<sup>50</sup> U.S. Transgender Survey, *supra*, at 125.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Nina Feldman et al., *Black Mothers Get Less Treatment For Postpartum Depression Than Other Moms*, *The Philadelphia Inquirer* (Dec. 6, 2019) (“[W]omen of color and low-income mothers . . . are several times more likely to suffer from postpartum mental illness but less likely to receive treatment than other mothers.”); Patti Neighmond, *Why Racial Gaps In Maternal Mortality Persist*, *Nevada Public Radio* (May 20, 2019), <https://bit.ly/2HFJDbj> (“Black and Native American women die of pregnancy-related causes at a higher rate than white women. Researchers say the gaps are driven by unequal access to health care and the experience of racism.”); *accord Racial and Ethnic Disparities Continue in Pregnancy-Related Deaths*, Centers for Disease Control, <https://bit.ly/3iwZrtF>.

nondiscrimination policies are associated with higher rates of alcohol use disorders, generalized anxiety disorders, mood disorders, and other forms of psychiatric morbidity for lesbian, gay, and bisexual people.<sup>54</sup> A study examining Title VII complaints alleging sexual orientation and gender identity discrimination similarly found that, in states with no state law protections specific to such discrimination, people reported more overt forms of employment discrimination—such as discharge or harassment—than counterparts in states with such protections.<sup>55</sup> Other evidence suggests that the absence of state-level protections can exacerbate existing disparities between marginalized and non-marginalized communities. One study found that LGBT people living in states with no state-level sexual orientation and gender identity protections experienced larger disparities in health insurance coverage and household income than LGBT people living in states with such protections.<sup>56</sup>

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<sup>54</sup> Mark L. Hatzenbuehler, *Structural Stigma and Health Inequalities: Research Evidence and Implications for Psychological Science*, 71 *Am. Psych.* 742, 745-46 (2016), <https://bit.ly/30zy2kE>.

<sup>55</sup> Amanda K. Baumle et al., *New Research on Sexual Orientation and Gender Identity Discrimination: Effect of State Policy on Charges Filed at the EEOC*, 67 *J. Homosexuality* 1135, 1140-1142 (2020), <https://bit.ly/3nlp4kT>.

<sup>56</sup> Amira Hasenbush et al., *The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain & Southern States* 13, 15-16 (2014), <https://bit.ly/3kR3Yc8>.

Federal civil rights laws play an important role in mitigating the impact of discrimination, especially where state policies have reflected a baseline of mistreatment. For example, an analysis of Black infant death rates in the United States showed that, following the passage of the Civil Rights Act, the death rate in states with Jim Crow laws dropped, converging with the death rate in states that had no Jim Crow laws.<sup>57</sup> Similar studies have shown the Civil Rights Act to be associated with positive health outcomes for Black people, including outcomes related to birthweight, Apgar scores (indicators of newborn health), and infant mortality.<sup>58</sup> Congress intended Section 1557 to have a similar impact in the health setting—improving the health of marginalized people by outlawing discrimination. That aspiration will only be realized through robust enforcement.

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<sup>57</sup> Nancy Kreiger et al., *The Unique Impact of Abolition of Jim Crow Laws on Reducing Inequities in Infant Death Rates and Implications for Choice of Comparison Groups in Analyzing Societal Determinants of Health*, 103 Am. J. Pub. Health 2234, 2237 (2013), <https://bit.ly/34I4tir>.

<sup>58</sup> R.A. Hahn et al., *Civil rights as determinants of public health and racial and ethnic health equity: health care, education, employment, and housing in the United States*, 4 SSM – Population Health 17, 20 (2014), <https://bit.ly/34tV3H6>.

## **D. Compensatory Damages are Necessary to the Successful Enforcement of Section 1557.**

### *1. The Availability of Compensatory Damages Serves an Important Role in Civil Rights Enforcement.*

“Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”<sup>59</sup> The right to be free from discrimination promised in Section 1557 is no different. Among the basic principles articulated by the Supreme Court is that, ““where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.””<sup>60</sup>

The importance of damages as necessary to effectuate the congressional policy underlying Section 1557 could scarcely be clearer. First, claims for damages implicate issues of fundamental fairness associated with compensating victims of discrimination—a particularly weighty concern when the defendant is a state

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<sup>59</sup> *Hurt v. I.R.S.*, 889 F. Supp. 248, 252 (S.D. W. Va. 1995) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

<sup>60</sup> *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66 (1992) (quoting *Bell v. Hood*, 327 U.S. at 684); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 402 (1971) (Harlan, J., concurring) (“[I]n suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute.”).

actor.<sup>61</sup> Second, as with the violation of constitutional rights, damages awarded in response to state conduct that violates a federal statute ensures respect for values “of which popular majorities, no less than their elected representatives, might sometimes lose sight.”<sup>62</sup> In many cases, it is “damages or nothing,”<sup>63</sup> because administrative sanctions, injunctive relief, and criminal penalties do not necessarily amount to redress.<sup>64</sup>

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<sup>61</sup> See *Owen v City of Independence*, 445 U.S. 622, 651 (1980) (“A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.”).

<sup>62</sup> Richard H. Fallon, Jr. Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1788 (1991) (discussing “deterrent remedies” in the context of a damages award that “exerts significant pressure on government and its officials to respect constitutional bounds”).

<sup>63</sup> *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

<sup>64</sup> Nor do cases where damages are available in concert with other forms of relief diminish the importance of damages. To prevent statutory rights from being reduced to an “honor code” to be respected or ignored at the discretion of government defendants, courts must be vigilant to avoid facilitating a remedial “‘shell game’ where, as discrete remedies are reduced or limited, we are told that equally effective alternatives exist; nevertheless, when implementation of those remedies is at issue, the same justifications are provided for limiting those remedial measures.” David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. Ill. L. Rev. 1199, 1226 (2005).

2. *Compensatory Damages for Victims of Health Care Discrimination Play a Vital Role in Making Section 1557 Rights Meaningful.*

Section 1557 is a relatively young statutory provision. The body of judicial interpretation is consequently limited.<sup>65</sup> Cases that have been brought, however, reveal the importance of compensatory damages.<sup>66</sup> The lawsuit brought by Alina Boyden and Shannon Andrews, two Wisconsin state employees, against their employer health plan illustrates the point. Ms. Boyden and Dr. Andrews are two transgender women who were blocked from obtaining medically necessary gender affirming care by a categorical exclusion adopted by the health insurance plan offered by Wisconsin as an employment benefit. The deprivation injured Ms. Boyden and Dr. Andrews in different ways. Ms. Boyden, unable to afford the bill, went without gender affirming surgery, with consequent emotional distress. Dr.

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<sup>65</sup> The constituent statutes underlying Section 1557 have far longer track records, of course. Even a cursory review of the bodies of jurisprudence interpreting three of those statutes reveals compensatory damages as integral to their meaningful enforcement. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (Title IX); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007) (Section 504 of the Rehabilitation Act); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994) (same); see also *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (“[P]rivate individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.”).

<sup>66</sup> Although plaintiffs in civil rights actions can seek to enjoin individual state officials prospectively under the *Ex Parte Young* doctrine, the sovereign immunity arguments *sub judice* imperil the ability of a federal court to enjoin a state health plan itself from engaging in discriminatory conduct. Nevertheless, the focus of *Amici* is on compensatory damages as a key remedial tool for plaintiffs seeking to enforce their health care rights.

Andrews paid nearly \$15,000 out of her own pocket for care, exhausting her retirement savings in the process. Both injuries were described in the court's opinion finding standing to sue. "A court order requiring [Defendant] to pay damages for Andrews's surgical costs would provide her redress."<sup>67</sup> Indeed, having already traveled the difficult road of unsuccessfully appealing her coverage denial, Dr. Andrews' claim was another example of "damages or nothing."<sup>68</sup> Without the ability to seek compensatory damages, Dr. Andrews's claim would have been reduced to an advisory opinion about past wrongs she already experienced.<sup>69</sup>

For Ms. Boyden, damages served a different purpose: the vindication of her civil rights. After listening to the jury award compensatory damages, Ms. Boyden's reaction underscores the centrality of this verdict to the meaningful enforcement of her health care rights under Section 1557.<sup>70</sup>

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<sup>67</sup> *Boyden v. Conlin*, No. 17-CV-264-WMC, 2018 WL 2191733, at \*5 (W.D. Wis. May 11, 2018).

<sup>68</sup> *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

<sup>69</sup> At trial, Dr. Andrews testified at length about how the discriminatory insurance policy at issue affected her beyond cost. "When I was a postdoctoral fellow, and this would have been in 2011 and 2012 [before surgery], I had kind of a suicidal episode and this impacted my work. And I was kind of convinced that my options were either get some kind of medical treatment or I was going to die." Direct Examination of Shannon Andrews at 1-A-150, *Boyden v. Conlin*, No. 17-CV-264-WMC (W.D. Wis. Oct. 9, 2018).

<sup>70</sup> Ms. Boyden's trial testimony was equally compelling. Describing her mental state prior to starting hormone therapy, she testified, "I was, you know, frequently suicidal. I think the main thing that kept me going was just the thought that I was going to have treatment, and, you know, that was kind of a lifeline." Direct

It was wonderful to see a process where eight ordinary Wisconsinites were able to listen to our story, see that we were harmed and make the decision that they did. . . . No one should have to tell their story to a room full of strangers to justify their medical expenses, but I am thankful I had the opportunity to share my story. I hope this sends a powerful message to fellow transgender people in Wisconsin that our health matters.<sup>71</sup>

*Boyden* is a cardinal example of the integral role that compensatory damages play in the enforcement of Section 1557.

*Boyden* is not unique. In April 2015, Katherine Prescott took her 14-year-old son, Kyler, to Rady Children’s Hospital in San Diego, seeking treatment for suicidal ideation associated with gender dysphoria. The hospital is affiliated with the University of California San Diego School of Medicine and accepts millions of dollars in federal funds annually, making it subject to Section 1557. “Despite knowing that Kyler was a ‘transgender boy in acute psychological distress,’ ‘nursing and other [hospital] staff repeatedly addressed and referred to Kyler as a girl, using feminine pronouns. . . . which caused him extreme distress.’”<sup>72</sup> Instead of treating him, the hospital discharged him before his medical hold expired.<sup>73</sup> Five

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Examination of Alina Boyden at 1-P-6, *Boyden v. Conlin*, No. 17-CV-264-WMC (W.D. Wis. Oct. 9, 2018).

<sup>71</sup> Joe Kelly, *Wisconsin Jury Awards \$780K to Transgender State Workers*, Courthouse News Service (Oct. 11, 2018), <https://bit.ly/3jreE0Z>.

<sup>72</sup> *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1097 (S.D. Cal. 2017) (quoting complaint).

<sup>73</sup> *Id.*

weeks later, Kyler died by suicide. Ms. Prescott brought suit under Section 1557, seeking compensatory damages related to the distress caused by the hospital's gender identity discrimination in the weeks before her son's death. After holding that compensatory damages were available under applicable federal common law governing Title IX and Section 1557, the Court approved a settlement between the parties in an undisclosed amount.<sup>74</sup> No judicial relief will ever bring Kyler Prescott back. Being able to bring a lawsuit for compensatory damages was central to making his Section 1557 rights meaningful.<sup>75</sup>

In *Flack v. Wisconsin Dep't of Health Servs.*,<sup>76</sup> four transgender Medicaid enrollees were subjected to a Wisconsin policy that categorically blocked access to medically necessary care related to gender affirmation. After winning summary judgment on their own behalf and on behalf of a class of similarly situated individuals, the named plaintiffs accepted a settlement of their individual claims,

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<sup>74</sup> *See id.* at 1101.

<sup>75</sup> Katherine Prescott is quoted in a public statement following the settlement. "When my son was in despair, I entrusted Rady Children's Hospital with his safety and well-being[.] Hospitals are supposed to be safe places that help people when they're in need. Instead of recovering at the hospital, Kyler got worse because staff continued to traumatize him by repeatedly treating him as a girl and ignoring his serious health issues. It's painful to speak out, but I want to make sure no other parent or child ever has to go through this again." Jennifer Bing, Client Spotlight: Remembering Kyler Prescott, National Center for Lesbian Rights (Feb. 20, 2020), <https://bit.ly/3kVMc7r>.

<sup>76</sup> 395 F. Supp. 3d 1001 (W.D. Wis. 2019).

which was intended to compensate them for the emotional distress, physical injuries, economic losses, and other injuries incurred as a result of the state policy.<sup>77</sup> The *Flack* decision underscores the role that compensatory damages play to ensure that state Medicaid programs comply with federal nondiscrimination law.<sup>78</sup>

Even in its nascent state, Section 1557 jurisprudence reflects the importance of compensatory damages, especially in matters where state actors have engaged in sex discrimination, as integral to securing the ACA's pledge to ensure nondiscriminatory access to federally supported health programs and activities.

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<sup>77</sup> Partial Settlement Agreement and Mutual Release, *Flack v. Wisconsin Dep't of Health Servs.*, No. 3:18-cv-00309, at ¶3 (Oct. 29, 2019 W.D. Wis.), <https://bit.ly/3kUNsb6>.

<sup>78</sup> Although the primary focus of *Amici* is on Section 1557's role as a bulwark against sex discrimination in health care and health insurance affiliated with state government, mistreatment takes other forms as well. In 2017, a state-affiliated hospital in New Orleans settled a case arising from its discrimination against a deaf patient who communicates by American Sign Language and has a limited ability to read, write, speak, or understand English. *See Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. CV 17-4803, 2017 WL 4791185 (E.D. La. Oct. 24, 2017). The plaintiff, Kimberly Esparza, "made repeated requests for auxiliary aids, yet [hospital staff] failed on several occasions to provide effective aids and . . . refused to provide an interpreter after one had been requested." *Id.* at \*17. Reviewing these allegations, the Court found the hospital to have purposefully discriminated against Ms. Esparza in violation of Section 1557. *Id.* at \*18. A compensatory settlement quickly followed, reflecting the value of the rights violations alleged by Ms. Esparza. Similar damages claims brought by litigants with hearing impairments under Section 1557 have likewise resulted in settlement. *See, e.g., Audia v. Briar Place, Ltd.*, No. 17-CV-6618, 2018 WL 1920082 (N.D. Ill. Apr. 24, 2018).

#### IV. CONCLUSION

The *Amici Curiae* are acutely aware of what is at stake in this appeal. As advocates for individuals and communities with a history of discrimination in access to health care, they know first-hand how important compensatory damages can be in preventing and redressing mistreatment. This importance is accentuated when discrimination comes at the hand of a state actor, both because of the pervasiveness of public control over the health care system and the covenant of equal treatment between a government and the governed. For all the reasons set forth herein, this Court should affirm the judgment of the U.S. District Court for the Middle District of North Carolina.

Dated: October 7, 2020

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\* Counsel acknowledges the assistance of Quinnipiac University School of Law student, Lexie Farkash, in preparing this brief.

## CERTIFICATE OF COMPLIANCE

I certify the following in accordance with Fed. R. App. 32(g)(1):

1. This brief complies with the type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (i.e., cover page, disclosure statement, table of contents, table of authorities, certificate of counsel, signature blocks, proof of service, addendum), this brief contains 6,464 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Federal R. App. 32(a)(6), because it was prepared in a proportionally spaced serif typeface using Microsoft Word in 14-point font size and Times type style.

Dated: October 7, 2020

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I certify that on October 7, 2020, I electronically filed the foregoing document with the Clerk of Court of the United States Court of Appeals for the Fourth Circuit by using the EM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated:     October 7, 2020

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